

CROWN RESOURCE CORP.

IBLA 84-522

Decided March 28, 1986

Appeal from decisions of Eastern States Office, Bureau of Land Management, rejecting hardrock prospecting permit applications in part. ES-32538 and ES-32541.

Affirmed.

1. Mineral Lands: Prospecting Permits

In June 1981 a 2-year extension of a prospecting permit properly ran from the date of expiration of the primary term of the permit and a BLM decision purporting to extend the term beyond that 2-year period was improper. Thus, when a prospecting permit applicant filed an application for certain lands covered by the extension shortly after the expiration of the 2-year period, the land was available and that applicant established priority such that a subsequent application was properly rejected by BLM.

APPEARANCES: James H. Falk, Esq., Washington, D.C., for appellant; Barry E. Crowell, Esq., Office of the Solicitor, U.S. Department of the Interior, Alexandria, Virginia, for the Bureau of Land Management; Jerry L. Haggard, Esq., and Daniel L. Muchow, Esq., Phoenix, Arizona, for intervenor ASARCO, Incorporated.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Crown Resource Corporation (Crown) has appealed from two decisions of the Eastern States Office, Bureau of Land Management (BLM), dated March 26, 1984, rejecting its hardrock prospecting permit applications, ES-32538 and ES-32541, in part, respectively.

On June 1, 1983, appellant filed two hardrock prospecting permit applications for a total of 4,282.53 acres of acquired land situated in the Mark Twain National Forest, Shannon and Oregon Counties, Missouri. In its March 1984 decisions, BLM rejected appellant's applications with respect to a total of 1,708.24 acres which was unavailable because it previously had been included in prospecting permit ES-32487 issued effective January 1,

1984, to ASARCO, Incorporated (ASARCO). Appellant filed a timely appeal from the decisions and, on December 14, 1984, ASARCO filed a motion to intervene, which is hereby granted. ^{1/}

In its statement of reasons for appeal, appellant states that the rejected land described in its applications had formerly been included in hardrock prospecting permits ES-17617 and ES-17618 issued effective May 1, 1979, to AMAX Exploration, Inc. (AMAX). These permits were issued for a term of 2 years, but subject to extension. By decision dated June 5, 1981, BLM extended the AMAX permits until May 31, 1983. Appellant states that it relied on this extension in filing its applications on June 1, 1983. In contrast, appellant points out that ASARCO relied on a decision by the Board in an unrelated proceeding "regulating the permissible length of time for extensions of such permits," and filed its application on May 2, 1983, a date considered by Crown to be prior to the expiration of the AMAX permits. Appellant concludes that both Crown and ASARCO relied in good faith on Departmental decisions and that their applications should be considered as having been simultaneously filed pursuant to 43 CFR 3511.1-6(b), and a drawing held to determine priority.

In its answer to appellant's statement of reasons, BLM contends that its June 5, 1981, decision extending the AMAX permits was "erroneous" because the 2-year extension properly ran from the date of expiration of the primary term, i.e., from May 1, 1981, until April 30, 1983, and not from June 1, 1981, until May 31, 1983, citing ASARCO, Inc. (ASARCO I), 70 IBLA 91 (1983). BLM concludes that, given an April 30, 1983, expiration date, ASARCO's application was filed prior to Crown's. BLM notes that the Board in ASARCO, Inc. (ASARCO II), 72 IBLA 110 (1983), held that because of an inordinate delay by BLM in granting extensions, the 2-year extension would be deemed to run from the date of approval of the extensions. BLM concludes that ASARCO II is not applicable because there are not the same equitable considerations, and that, even if it was to be applied, the expiration date of AMAX's permits would be June 4, 1983, subsequent to the filing of appellant's applications. BLM states that in the latter instance appellant's applications would be rejected in part, citing State of Alaska, 46 IBLA 12 (1980). BLM also states that it is not estopped to reject appellant's application due to appellant's reliance on the June 1981 BLM decision. Finally, BLM argues that it is not authorized to treat the applications of Crown and ASARCO as simultaneously filed, in accordance with 43 CFR 3511.1-6(b), where the applications were not and cannot be deemed to have been filed "at the same time."

In its brief, ASARCO contends that on May 2, 1983, the subject lands were open for prospecting permit application. ASARCO notes that AMAX had applied for a 2-year extension on February 2, 1981. ASARCO contends that the BLM decision that the permits were to expire on May 31, 1983, was erroneous because BLM had no authority to extend the permits beyond April 30, 1983, citing ASARCO I as authority in support of its contention. ASARCO recognizes, however, that "this strict rule was somewhat modified" by ASARCO

^{1/} By order dated Nov. 7, 1984, the Board served ASARCO with all documents filed with the Board and afforded ASARCO an opportunity to intervene in this case. ASARCO's motion for leave to intervene and a brief were filed by ASARCO in response to the order.

II but advances the argument that the facts in ASARCO II demonstrated an inordinate delay by BLM in granting the prospecting permit extension, which facts are not present in the case now before us. ASARCO thus concludes that because there was no inordinate delay in this case, "BLM was without authority to grant AMAX's extension beyond April 30, 1983," and the lands were open for application on May 2, 1983, when ASARCO filed its application. ASARCO states that, since the lands were open for application on May 2, 1983, ASARCO's application was filed prior to the application filed by Crown, and has priority under the provisions of 43 CFR 3511.1-6(a), and Crown's application was properly rejected.

ASARCO argues that its actions were prudent and consistent with applicable law. It argues that a prudent mineral company must file application on a date that is 2 years after the primary term of the prospecting permit. In support of the contention it advances the argument that mineral companies have no means to determine if there has been an inordinate delay in granting an extension, and claims that, in spite of the BLM decision to the contrary, the permits expired 2 years after the end of the primary term, because there was no inordinate delay in this case. ASARCO also asserts that Crown has not shown error in the BLM decisions and that there is no authority to treat the applications as having been filed simultaneously.

[1] In ASARCO I we concluded that the 2-year extension of a prospecting permit commences upon the expiration date of the permit, since by definition an extension is a prolongation of the primary term of the permit. We noted that, because of the delay in processing the permittee's request for an extension, the permittee received an extension which would run for a period less than 2 years despite a recommendation that it receive the full 2-year extension. Nevertheless, we found the permittee to be ultimately responsible because it did not take advantage of the provision allowing it to file its request for an extension 90 days prior to the expiration date. The request for an extension had been filed 2 days before the expiration date. We stated: "Had it done so [filed 90 days prior to expiration], assuming the same processing time, it would have received the extension with only a short delay * * *." ASARCO I, *supra* at 92.

In ASARCO II, we were faced with a substantially different fact situation. In that decision, we noted that the permittee had filed timely requests for extensions, and that, because of the inordinate delay in processing the requests, the actual extensions would have amounted to from less than 4 months to less than 14 months, rather than the 2 years contemplated by 43 CFR 3511.3. Accordingly, we directed BLM to consider the permits suspended from the expiration dates of the primary terms of the permits until the date extensions were finally granted, with the 2-year extension to run from the date they were granted.

In both ASARCO I and ASARCO II we established that as a matter of law extensions commenced effective on expiration of the permit. In April 1983 in ASARCO II because of the inordinate processing delays by BLM the Board ordered BLM to suspend retroactively the running of the 2 years for the period from expiration to approval. By an amendment to 43 CFR 3511.3-3, effective on May 25, 1984, BLM added a provision that "[t]he duration of the

extended prospecting permit shall commence upon the approval of the application for extension by the authorized officer." 49 FR 17902 (Apr. 25, 1984). Until the adoption of that regulation, BLM had no authority to compensate for its delays in processing a prospecting permit holder's application for an extension as it attempted to do for AMAX in this case. In June 1981, little more than 1 month after expiration on April 30, 1981, of ES-17617 and ES-17618, BLM issued a decision extending those permits to May 31, 1983. BLM had no authority at that time to make such an extension. The fact, as disclosed in ASARCO II, that BLM may have at times granted extensions for more than 2 years because of administrative delay does not mean that it was authorized to do so.

Thus, Crown's reliance on BLM's June 1981 decision extending the AMAX permits cannot serve to benefit Crown because such reliance can not operate to vest any right not authorized by law and the United States is not bound by the acts of its officers when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. 2/ 43 CFR 1810.3(b) and (c); cf., Blanche W. Peterson, 67 IBLA 388 (1982) (reliance on erroneous information in BLM pamphlet cannot create rights not authorized by law). BLM was not authorized to grant the extension provided by the June 1981 decision. It follows that the extended AMAX permits expired on April 30, 1983. When ASARCO filed its permit application on May 2, 1983, for some of the lands covered by the AMAX permits those lands were available for prospecting and BLM issuance to ASARCO of prospecting permit ES-32487 was proper. Crown's applications were properly rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

2/ The dissent asserts the presumption of regularity and the good faith belief of Crown and AMAX that the AMAX permits had been extended to May 31, 1983, by decision should preclude BLM from subsequently amending that decision to the detriment of Crown, "even if it was improper to extend the prospecting permit[s] to May 31, 1983." It was improper in June 1981 for BLM to extend the permits to May 31, 1983. It had no authority to do so. The presumption of regularity and good faith belief can not change that fact. They are irrelevant to determination of this case.

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

When reviewing the majority opinion I asked myself four questions. What is an inordinate delay? Who is most able to determine if an inordinate delay has occurred? Which "mistake" by a Government employee should we recognize? What are the consequences of this error?

A holder of a prospecting permit must delay filing for an extension until the last 90 days of his permit. 43 CFR 3511.3-2(a). It is my opinion that when providing a permittee less than 90 days in which to file a permit, BLM believed it was capable of processing a request for an extension within the 90-day period. If this were not the case, no permittee would ever have a 2-year extension. Thus, I would accept any delay in excess of 90 days as inordinate. If BLM routinely requires more time, it would be logical to lengthen the allowable period for filing applications for extensions.

Even the majority does not say that the case now before us is similar to ASARCO I (ASARCO, Inc., 70 IBLA 91 (1983)), where ASARCO filed application for an extension 2 days prior to the end of the primary term. AMAX had filed its application over 2 months prior to the end of the primary term. I find no fault with the BLM determination that an inordinate delay had occurred when processing the AMAX extension.

In answer to the second question I must conclude the majority has held that only this Board can find an inordinate delay has occurred. How can one conclude otherwise? The basis for setting the expiration date at June 1, 1981, was "because of administrative delay" (Memorandum from Director, Geological Survey, dated May 22, 1981). An extension was granted shortly after this determination, clearly stating the expiration date of the extension to be May 31, 1983, or 2 years plus the time between the second anniversary date and the date of approval. The majority holds this decision to be in error, stating "BLM's June 1981 decision extending the AMAX permits cannot serve to benefit Crown," even though the majority also states "in ASARCO II [ASARCO, Inc., 72 IBLA 110 (1983)] because of the inordinate processing delays by BLM the Board ordered BLM to suspend retroactively the running of the 2 years for the period from expiration to approval." I do not claim to have sufficient knowledge of the facts to disagree with the June 1981 BLM decision that administrative delay did occur through no fault of AMAX. ^{1/} No evidence to the contrary has been presented. I do not choose to substitute my judgment for BLM's in this matter, unless (as in ASARCO II) BLM's judgment is clearly erroneous.

We are in a position of having to choose between two BLM errors. Either the decision that the AMAX extension would expire on May 31, 1983, was in error or the acceptance of the ASARCO permit application, filed on

^{1/} The subsequent change of the regulations also recognizes the inequity of shortened extension terms resulting from administrative delay. The extension is now granted for 2 years following approval. See 43 CFR 3511.3-3.

May 2, 1983, was in error. "Applications for permits filed for lands not available for prospecting or leasing * * * will be rejected." 43 CFR 3501.1-6. If the extension is valid, the lands were not available at the time ASARCO submitted its application. The majority chose to recognize the first as being in error but then compounded the error by making an additional error.

A primary question is presented by this case and ignored by the majority. This question is, what effect does Crown's filing a prospecting permit application have upon BLM's ability to subsequently amend its earlier decision in a manner which destroys the priority of Crown's application? A prospecting permit extension was granted to AMAX. The term of this permit extension was clearly stated in unequivocal terms. There can be no question regarding the stated expiration date of the AMAX permit. Assuming there was an error and the decision should have stated April 30, 1983, as the expiration date, the party claiming error is obligated to overturn the decision. Unless an appeal is taken the decision is considered to be final and is presumed valid until overturned. Tommy L. Alford, 71 IBLA 29, 32 (1983). Thus, if the decision to extend the lease through May 31, 1983, was regular on its face, it remained in effect until reversed. ^{2/} Between April 30, 1983 (the date the lease would have expired pursuant to the majority decision), and the date BLM made its determination that its prior decision incorrectly extended the AMAX permit through May 31, 1983, Crown filed its application, in reliance upon the prior decision by BLM. While BLM can always reconsider a prior decision, it cannot do so to the detriment of a third party who acted in good faith reliance upon that decision. E.g., F. Peter Zoch, 60 IBLA 150 (1981). The majority holds Crown should not benefit from BLM's error. It does not seek to do so.

There is a presumption that BLM officials have properly discharged their duties. Neil R. Foster, 88 IBLA 296 (1985); Jack Bolke, 88 IBLA 58 (1985); Ronald Edwards, 87 IBLA 367 (1985); United States v. Ramsey, 84 IBLA 66 (1984). Are BLM and the majority now saying that this presumption should be modified so as to apply only in those cases where the recognition of a presumption of regularity would work to the detriment of the appellant? It is obvious that in this case Crown merely relied upon the determination by BLM that the AMAX prospecting permit would not expire until May 31, 1982.

Until the decision that the AMAX permit would expire on May 31, 1983, was modified, both AMAX and Crown acted in the good faith belief that the decision was correct. Only ASARCO sought to take advantage of what was subsequently determined to be an error. Thus, this after-the-fact modification of a prior decision should not operate in a manner to divest Crown of the rights it would have acquired but for the subsequent modification. ^{3/} Cf.,

^{2/} This is analogous to the segregative effect of state selection. If a state selection is regular on its face, it segregates the land from entry until rejected. John C. and Martha Thomas (On Reconsideration), 59 IBLA 364 (1981).

^{3/} If there had been no intervening rights a finding of error in extending the AMAX prospecting permit through May 31 would have no adverse effect. By the time BLM found fault with its earlier decision the AMAX permit had expired.

F. Peter Zoch, supra. The extension was neither void nor irregular on its face. 4/

I therefore conclude that, even if it was improper to extend the prospecting permit to May 31, 1983, BLM could not subsequently amend its decision to the detriment of Crown, who had acted in good faith reliance upon that decision. Prior to the second decision the AMAX extension was not void but voidable in part. It was regular on its face. By August 1983, when BLM acted to "cancel" the last month of the permit extension, Crown had acted in good faith reliance upon BLM's prior decision, which was a matter of record, believing the extension to be properly granted and that the BLM employees had properly discharged their duties. Under the majority opinion ASARCO clearly benefited from the error. Crown would have benefited only if there had been no error. The majority points its collective finger at the wrong party.

R. W. Mullen
Administrative Judge

4/ If it was, the ASARCO II extensions would be as well.

